Supreme Court, U.S.
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No. 00-1021

In The

Supreme Court of the United States

RUSH PRUDENTIAL HMO, INC.,

Petitioner,

v.

DEBRA MORAN and STATE OF ILLINOIS,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

JENNIFER R. COOK
Counsel of Record
MARY ELIZABETH SENKEWICZ
NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS
444 North Capitol Street, Suite 701
Washington, D.C. 20001
(202) 624-7790

MARC I. MACHIZ
COHEN, MILSTEIN, HAUSFELD & TOLL, P.L.L.C.
1100 New York Ave., N.W.
West Tower, Suite 500
Washington, D.C. 20005
(202) 408-3757
Counsel for National Association of Insurance Commissioners

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INTEREST OF AMICUS CURIAE[1]

The National Association of Insurance Commissioners (NAIC) is a non-profit corporation comprised of the chief insurance regulators in each state, four territories and the District of Columbia. The NAIC assists these officials in the pursuit of fundamental insurance regulatory objectives, including: (1) maintaining and improving state regulation in a responsive and efficient manner; (2) maintaining the reliability of insurance business with respect to financial solidity and guarantees against loss; and (3) ensuring fair, just and equitable treatment of policyholders and claimants.[2]

The issue before this Court implicates the NAIC's objectives because it addresses whether the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, *et seq.* (2001), preempts state independent review laws that regulate insurance within the meaning of ERISA's saving clause, § 514(b)(2)(A).

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[1] Pursuant to Supreme Court Rule 37.3(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, counsel for any party did not author this brief in whole or in part. No person or entity, other than this Amicus Curiae, made a monetary contribution to the preparation and submission of this brief.

[2] National Association of Insurance Commissioners (NAIC) Constitution, Article II. Mission Statement, 1 1997 PROC. OF THE NAT'L ASS'N OF INS. COMMISSIONERS iv (1st qtr.)

The NAIC adopted the Health Carrier External Review Model Act (Model Act), 1 MODEL LAWS, REGULATIONS AND GUIDELINES No. 75 (2000), on October 4, 1999.[3] Generally, the Model Act provides for independent review of health carrier coverage decisions based on medical judgment. By adopting this Model Act, the NAIC declared that the independent review of certain claims determinations furthers the NAIC mission – to ensure the fair, equitable and just treatment of insurance consumers. *Id.* This Court should affirm insurance regulators' ability to protect insurance consumers by affirming the United States Court of Appeals for the Seventh Circuit's decision in *Moran v. Rush Prudential HMO, Inc.*, 230 F.3d 959 (7th Cir. 2000), *cert. granted*, U.S.L.W. (U.S. June 29, 2001) (No. 00-1021).

SUMMARY OF ARGUMENT

This Court should affirm the Seventh Circuit's decision in *Moran* and hold that Illinois's independent review law, 215 ILL. COMP. STAT. 125/4-10 (2001) (Section 4-10), is not preempted by ERISA. Section 4-10 is saved as a law that "regulates insurance" within the meaning of ERISA's saving clause, § 514(b)(2)(A). The Seventh Circuit in *Moran* and the United States Court of Appeals for the

[3] *See* Br. for NAIC as Amicus Curiae in Support of Petition for Writ of Certiorari at 2-9, *Moran v. Rush Prudential HMO, Inc.*, 230 F.3d 959 (7th Cir. 2000) (No. 00-1021) (discussion of the NAIC Health Carrier External Review Model Act and state independent review laws that will be impacted by this Court's decision in this case.)

Fifth Circuit in *Corporate Health Ins. Inc. v. The Texas Dep't of Ins.*, 215 F.3d 526 (5th Cir. 2000), the only two circuit courts to address the issue of ERISA preemption of state independent review laws, were correct in concluding that state independent review laws were within the insurance saving clause.

This Court should affirm the rationale of the Seventh Circuit, and hold that state independent review laws merely add terms to insurance contracts, which are enforceable through suits under ERISA. Alternatively, if this Court should find that state independent review laws create a remedy or enforcement mechanism that supplements § 502 of ERISA, 29 U.S.C. § 1132 (2001), this Court should hold that the laws are not, nevertheless, preempted. This Court should revisit its opinion in *Pilot Life v. Dedeaux*, 481 U.S. 41 (1987), and clarify that, by its plain language, ERISA's saving clause, § 514(b)(2)(A), limits the preemptive effect of § 502.[4]

[4] The NAIC understands that Respondent may argue that Illinois's independent review law is not preempted under ERISA because it is a law regulating health care, a subject of traditional state regulation, and therefore does not "relate to" an ERISA Plan. In light of this Court's decision in *Pegram v. Herdrich*, 530 U.S. 211, 219 (2000), we think that this argument has merit. The NAIC, however, has chosen to address those issues involving the regulation of insurance – our unique area of expertise.

ARGUMENTS

A. Illinois's Independent Review Law Regulates Insurance Within the Meaning of ERISA's Saving Clause.

1. The circuit courts agree that independent review laws are saved as laws regulating insurance.

Only two federal courts of appeals have addressed the issue of ERISA preemption of state independent review laws, the Fifth Circuit in *Corporate Health* and the Seventh Circuit in *Moran*. While they reached opposite conclusions about ERISA preemption, both concluded that the state's independent review law regulated insurance within the meaning of ERISA's saving clause, § 514(b)(2)(A). The Fifth Circuit held that the Texas independent review law "meet[s] the common-sense test of the saving clause" and "satisf[ies] the second and third prongs of the McCarran-Ferguson test." *Corporate Health*, 215 F.3d at 538. The Seventh Circuit likewise held that the Illinois law "regulates insurance under a common sense understanding" and clearly "meets at least two of the McCarran-Ferguson factors." *Moran*, 230 F.3d at 969.

In addition, this Court in *Unum v. Ward*, 526 U.S. 358 (1999), stated that the issue of whether California's notice-prejudice rule was a law that regulates insurance within the meaning of ERISA's saving clause, was an issue "heavily dependent on state law." *Id.* at 368. Illinois's independent review law, Section 4-10, applies to health maintenance organizations (HMOs) and according to the Seventh Circuit, HMOs are in the business of insurance under Illinois law. *See Anderson v. Humana, Inc.*, 24 F.3d 889, 892 (7th Cir. 1994); *In the Matter of Estate of Medcare HMO*, 998 F.2d 436, 444-46 (7th Cir. 1993). Consequently, this Court should defer to the circuit courts and

find that Section 4-10 regulates insurance within the meaning of ERISA § 514(b)(2)(A).

2. Illinois's independent review law regulates insurance from a common sense perspective.

Petitioner asserts that Illinois's independent review law fails to "regulate insurance" within the meaning of ERISA's saving clause, ERISA § 514(b)(2)(A). Petitioner focuses on the "common sense test," Br. for Pet'r at 36-40, and whether Section 4-10, because it applies to HMOs,[5] is a law directed specifically at the insurance industry.[6] Clearly, HMOs are insurers. HMOs are considered insurers under Illinois law.[7] The location of the HMO Act in the Insurance Chapter of the Illinois Code supports the common sense view that HMOs are insurers.[8] The Secretary of the Department of Labor, who is charged with interpreting and enforcing all provisions of Title I of ERISA, has taken the position that HMOs are insurers.[9]

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[5] "Each Health Maintenance Organization shall provide a mechanism for the timely review by a physician . . . in the event of a dispute between the primary care physician and the Health Maintenance Organization regarding the medical necessity of a covered service. . . . " 215 ILL. COMP. STAT. 125/4-10 (2001).

[6] The "common sense view of the word 'regulates' would lead to the conclusion that in order to regulate insurance, a law must not just have an impact on the insurance industry, it must be specifically directed toward that industry." Br. for Pet'r at 37, citing *Pilot Life v. Dedeaux*, 481 U.S. 41, 50 (1987).

[7] *See* discussion *supra* at 4.

[8] 215 ILL. COMP. STAT. 125/1-1, *et seq.* (2001).

[9] *See* Br. for Secretary of Labor as Amicus Curiae at 14, *Moran*, 230 F.3d 959 (No. 99-2574); Br. for the U.S. as Amicus

Several circuit courts have also concluded that HMOs are insurers.[10] Indeed, this Court has stated that HMOs are risk-bearing entities that function much like traditional insurers. *See Pegram v. Herdrich*, 530 U.S. 211, 219 (2000).

Petitioner asserts, however, that the Illinois definition of "HMO" applies to entities that have administrative service only contracts with self-funded employers because Illinois law allows HMOs to "devolve all risk onto their providers." Br. for Pet'r at 38. The fact that an HMO transfers ("devolves") risk to its providers does not mean that the HMO is not an entity engaged in the business of insurance subject to state regulation. An insurer need not retain the risk it assumes in order to be engaged in the business of insurance. In fact, indemnity insurers often reinsure their risk.[11] This spreading of risk

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Curiae at 23-24, *Pegram v. Herdrich*, 530 U.S. 211 (2000) (No. 98-1949); Br. for Secretary of Labor as Amicus Curiae at 7-10, *Washington Physician Serv. Ass'n v. Gregoire*, 147 F.3d 1039 (9th Cir. 1998) (No. 97-35536); Br. for Secretary of Labor as Amicus Curiae at 19-20, *Express Scripts v. Wenzel*, 262 F.3d 829 (8th Cir. 2001) (No. 00-2788).

[10] *See Ocean State Physicians Health Plan, Inc. v. Blue Cross and Blue Shield*, 883 F.2d 1101, 1108 (1st Cir. 1989); *Anderson v. Humana, Inc.*, 24 F.3d 889, 892 (7th Cir. 1994); *Gregoire*, 147 F.3d at 1045-46; *Corporate Health Ins. Inc. v. The Texas Dep't of Ins.*, 215 F.3d 526, 538 (5th Cir. 2000); *Kentucky Ass'n of Health Plans, Inc. v. Nichols*, 227 F.3d 352, 364-65 (6th Cir. 2000); *but see, O'Reilly v. Ceuleers*, 912 F.2d 1383, 1389 (11th Cir. 1990).

[11] *See* ROBERT W. KLEIN, NAT'L ASS'N OF INS. COMMISSIONERS EDUC. & RES. FOUND., A REGULATOR'S INTRODUCTION TO THE INSURANCE INDUSTRY at 3-13 (1999) ("Insurers purchase reinsurance to reduce their risk."); *see also* NAC REINSURANCE CORP., REINSURANCE CONTRACTS CONTENT AND REGULATION at 37 (2d ed. 1993) (practice of fronting, where one insurer cedes all its

does not alter the nature of the original insurance transaction – both the HMO and the indemnity insurer have assumed the risk of a subscriber's health care costs in exchange for a fixed fee.

In fact, it is this original transfer and spreading of risk, common to both indemnity insurers and HMOs, that this Court has referenced as being a "distinguishing feature of insurance," *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211-212 (1979). Both HMOs and indemnity insurers, in exchange for a payment from the policyholder, accept the risk of the policyholder's medical costs. This transfer of risk of loss from the insured to the insurer is the same whether the insurer is an HMO or indemnity company. As the Secretary points out in its amicus brief in *Washington Physicians Serv. Ass'n v. Gregoire*, "like an insurance concern, an HMO bears the risk of the need for medical assistance. And like an insurance concern, an HMO spreads this risk among its subscribers." Brief for Secretary of Labor as Amicus Curiae at 7-8, *Gregoire*, 147 F.3d 1039 (9th Cir. 1998) (No. 97-35536). An HMO that accepts and transfers risk is engaging in the business of insurance.[12] It makes scant sense to place such significance on the method by which an HMO chooses to fulfill its obligation to subscribers. Whether by

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risk to an assuming insurer, does not alter either parties' obligations under their respective contracts.)

[12] "Insurance is an arrangement for transferring and distributing risks." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211 (1979), citing G. Richards, the Law of Insurance § 2 (W. Freedman 5th ed. 1952).

employing providers or entering into contractual arrangements, such arrangements fail to alter the fundamental insurance contract with the subscribers.[13]

Illinois's law, by regulating entities that provide or arrange for health care plans, ensures that entities are not able to evade state insurance law through creative corporate and contract structures. Even if, through some such creative structure, an HMO entered into a three party contract with an employer where it provided a network that assumed all the risk of providing health care and the HMO only assumed administrative responsibility, the Illinois law would still regulate the HMO and probably, additionally, the provider network.[14] Under this scenario, both the HMO and the provider network are providing or arranging for a health care plan, covered under the definition of HMO under Illinois law. Such regulation is entirely proper and good public policy because otherwise entities could avoid state insurance regulation by dividing the traditional functions of an insurer among distinct corporate entities.

Regardless of the risk sharing arrangements an HMO may have with its providers, the plain language of the Illinois statute makes clear that an HMO does not include

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[13] *See In the Matter of Estate of Medcare HMO*, 998 F.2d 436, 444 n.7 (7th Cir. 1993) ("The distinction between cash indemnification and provision of service in kind is not, from the perspective of enrollees, very marked. The enrollees' health care costs are met by the organization in question under either scenario.")

[14] *See infra* at 9 (definition of "Health maintenance organization" 215 ILL. COMP. STAT. ANN. 125/1-2 (2001)).

an entity involved in an administrative services only contract with a self-funded employer. Illinois law defines HMO as "any organization formed under the laws of this or another state to provide or arrange for one or more health care plans under a system which causes any part of the risk of health care delivery to be borne by the organization or its providers." 215 ILL. COMP. STAT. § 125/1-2(9) (2001). According to this definition, "arranging" involves risk being borne by the HMO or "its" providers. If the employer retains the risk, then the HMO is clearly not providing or arranging for a health care plan where risk is being borne by an entity other than the employer as is required by the Illinois definition of HMO. If the risk is not being borne by the employer, then the employer is not self-funding. Therefore, this definition applies exclusively to HMOs that are insurers.

The attempt of the Petitioner to misconstrue the definition of HMO in the Illinois Act to include administrative services only contracts with self-funded employers cannot succeed in any event. In addition to the plain language of the definitions in the law, this Court held in *FMC Corp. v. Holliday*, 498 U.S. 52, 65 (1990) that a state insurance law will only be invalidated to the extent that it applies to self-funded plans. *Id.*

3. Illinois's independent review law regulates insurance within the meaning of the three McCarran-Ferguson factors.

Petitioner also asserts that the Illinois law fails to satisfy any of the three factors[15] employed to determine whether a practice regulates the "business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012 (2001). *See* Br. for Pet'r at 40. It is important to remember that the McCarran-Ferguson Act does not contain identical language to ERISA. The McCarran-Ferguson Act makes reference to the "business of insurance." This Court in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 714 (1985) explained that "[c]ases interpreting the scope of the McCarran-Ferguson Act have identified three criteria relevant to determining whether a particular *practice* falls within that Act's reference to the 'business of insurance.' " *Id.* at 743 (emphasis added). This is a different inquiry than whether a state law "regulates insurance" within the meaning of ERISA's saving clause. ERISA makes reference to laws that "regulate insurance" and, through the inclusion of the "deemer" clause, § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B), makes "explicit Congress' intention to include laws that regulate insurance contracts within the scope of the insurance laws preserved by the saving clause." *Metropolitan Life*, 471 U.S. at 741. ERISA's reservation of state

[15] The three factors are: (1) whether the law has the effect of transferring or spreading a policyholder's risk; (2) whether the law is an integral part of the policy relationship between the insurer and the insured; and (3) whether the law is limited to entities within the insurance industry. *Unum v. Ward*, 526 U.S. 358, 373-375 (1999).

insurance regulation is explicitly broader in its scope than the McCarran-Ferguson Act, otherwise it would not have been necessary for Congress to make reference to laws regulating insurance contracts in the deemer clause.[16] Therefore, as this Court makes clear in *Ward*, the three McCarran-Ferguson factors are "checking points or guideposts" to consider, "not separate essential elements . . . that must each be satisfied" to save a state law within the meaning of ERISA § 514(b)(2)(A). *Ward*, 526 U.S. at 373-374.

In any event, Illinois's independent review law satisfies the three McCarran-Ferguson factors. First, Section 4-10 has the effect of transferring or spreading a policyholder's risk. This Court in *Metropolitan Life* held that Massachusetts's mental health law regulated insurance within the meaning of ERISA's saving clause because "it was intended to effectuate the legislative judgment that the risk of mental health should be shared." 471 U.S. at 743. According to the Secretary of Labor in its amicus brief before the Seventh Circuit in *Moran*, the Illinois independent review law similarly spreads risk by requiring an HMO to use a certain procedure for determining which claims to pay. *See* Br. for Secretary of Labor as Amicus Curiae at 12, *Moran* (No. 99-2574). This procedure is an integral part of risk spreading because it determines which risks will be spread and in what manner. *Id.* Indeed, HMOs factor these risks into setting the premiums for their contracts, which is a central element of risk spreading. *Id.* at 13. Section 4-10 also effectuates the

[16] *See also* Br. for Secretary of Labor as Amicus Curiae at 7-10, *Gregoire*, 147 F.3d 1039 (9th Cir. 1998) (No. 97-35536).

transfer of risk, as it regulates the performance of the terms of the insurance contract by mandating independent physician review when there is a coverage dispute based on medical necessity. As this Court in *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491 (1993) explained, "without performance of the terms of the insurance policy, there is no risk transfer at all." *Id.* at 504.

Second, the Illinois independent review law is an integral part of the policy relationship between the insurer and the insured. Similar to the notice-prejudice rule at issue in *Ward*, the Illinois independent review law goes to the heart of the insurer-insured relationship by dictating the process whereby the HMO decides whether benefits are owed to the insured. *See* 526 U.S. at 374-375. It provides an insured with a contractual right to an independent review process. This Court has "repeatedly held that state laws mandating insurance contract terms are saved from preemption." *Ward*, 526 U.S. at 375-376 (citing *Metropolitan Life*, 471 U.S. at 758) ("Massachusetts' mandated-benefit law is a 'law which regulates insurance' and so is not preempted by ERISA as it applies to insurance contracts purchased for plans subject to ERISA.")

This Court has also stated, in *Metropolitan Life*, that "[s]tatutes aimed at protecting or regulating [the relationship between an insurer and insured], directly or indirectly, are laws regulating the 'business of insurance.' " 471 U.S. at 744 (citation omitted). Section 4-10 regulates the relationship between an insurer and an insured by requiring independent physician review of coverage determinations made by managed care organizations,

based on whether a covered service is medically necessary, 215 Ill. Comp. Stat. 125/4-10 (2001).

Third, for all the reasons that Section 4-10 regulates insurance from a common sense perspective, the Illinois law is limited to entities within the insurance industry.

B. Illinois's Independent Review Law does not Provide a Remedy that Conflicts with § 502, and Even if it is a Remedy, it is Subject to the Saving Clause.

1. Illinois's independent review law does not provide an alternative enforcement mechanism in conflict with ERISA § 502.

Petitioner asserts that Section 4-10 creates an alternative enforcement mechanism to ERISA § 502, which was intended to be exclusive. Br. for Pet'r at 19-36. Under ERISA § 502(a)(1)(B), a beneficiary is able to "recover benefits due under the terms of the plan" or "enforce his rights under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B) (2001). Section 4-10 does not provide an alternative to this ERISA remedy, because under the Illinois statute an independent reviewer cannot enforce his coverage determination. Illinois's independent review law is no different from other state laws that are not preempted. Section 4-10 is like the mandated benefits law at issue in *Metropolitan Life*, which adds covered benefits to the terms of an insured ERISA plan. Section 4-10 is also indistinguishable from the notice-prejudice rule at issue in *Ward*. Illinois's independent review law changes the terms of an insured plan by adding procedural protections to assure that covered benefits promised by

the insurer are not misconstrued by decision makers whose fortunes are closely tied to the insurer.

Just as there would be no basis for challenging other state laws aimed at insurance carriers that adjust the method by which carriers decide claims, there is no basis for challenging Illinois's independent review law. The state is merely prescribing the qualifications of the person who has the authority to decide a type of claim. As the Secretary stated in its Brief before the Seventh Circuit, Section 4-10 "neither provides participants with an additional remedy where the HMO refuses to provide the covered service nor an alternative forum in which a participant can obtain the service," Br. for Secretary of Labor as Amicus Curiae at 18, *Moran* (No. 99-2574). Petitioner contends that the preemptive reach of § 502 requires that federal substantive law be applied in § 502 cases. Br. for Pet'r at 25-26 n.6. This Court has already rejected that view – implicitly in *Metropolitan Life*, 724 U.S. at 741, and explicitly in *Ward*, 526 U.S. at 377. If state mandates of the sort endorsed in *Metropolitan Life* are permitted, necessarily state substantive law must be applied to determine whether those mandates are being complied with in a particular case. As in *Ward*, where a participant could only enforce the notice-prejudice rule through a suit pursuant to § 502(a)(1)(B) of ERISA, the determination of the state-approved decision maker here, can only be enforced through ERISA. *See* Br. for Secretary of Labor as Amicus Curiae at 18, *Moran* (No. 99-2574). Section 4-10 does not replace ERISA's remedies, rather it provides the "relevant rule of decision," for a § 502 suit. *See Ward*, 526 U.S. at 377; *see also John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 98-99 (1993) ("ERISA leaves

room for complementary or dual federal and state regulation. . . . ")

Petitioner asserts that Section 4-10 impermissibly conflicts with the deferential standard of review of HMO benefits determinations to which HMOs are entitled under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989). Br. for Pet'r at 17. *Firestone* did not hold that ERISA requires deference to insurers or any plan administrators making benefit determinations. This Court in *Firestone* held that courts would presumptively review ERISA benefit determinations de novo, but that "a deferential standard of review [is] appropriate" when the decision maker is given "discretionary powers." 489 U.S. at 115.[17] This holding, however, does not prevent states from enacting laws that prevent insurers from writing policies that grant to themselves the amount of discretion that entitles them to deferential review. Without such discretion, *Firestone* requires judicial de novo review. By

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[17] This holding was qualified when this Court noted that "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'factor in determining whether there is an abuse of discretion.' " *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989) (quoting RESTATEMENT (SECOND) OF TRUSTS § 187, cmt. d (1959)). Since *Firestone*, the circuits have struggled to apply this command to benefit decisions by insurance carriers who, by definition, labor under a structural conflict of interest. The United States Court of Appeals for the Third Circuit in *Pinto v. Reliance Standard*, 214 F.3d 377 (3rd Cir. 2000), reviewed the circuits' efforts and the resulting multiple circuit splits. The Third Circuit decided "to apply the arbitrary and capricious standard, and integrate conflicts as factors in applying that standard, approximately calibrating the intensity of our review to the intensity of the conflict." *Id.* at 393.

shifting discretion to independent decision makers, the Illinois law will result in deference to the independent reviewer rather than the insurance company, which has a financial incentive to deny claims.

Under ERISA's saving clause, § 514(b)(2)(A), states are entrusted with the regulation of insurance and are free to determine the contents of insurance contracts. *See Metropolitan Life*, 471 U.S. at 741 (Congress intended to include laws that regulate insurance contracts within the scope of ERISA's saving clause.) Illinois's independent review law is just such a regulation of insurance contracts. By passing its independent review law, the Illinois legislature decided that insurers do not deserve deference when they are engaged in medical decision making to determine insurance coverage.

Petitioner repeatedly asserts in its brief that Section 4-10 is just a form of binding arbitration. Br. of Pet'r at 21, 22, 25, 27, 31 n.10. If so, Section 4-10 is surely not a remedy that conflicts with ERISA's remedial scheme.[18] This Court has repeatedly espoused the federal policy favoring arbitration. *See Circuit City Stores, Inc. v. Saint*

[18] Petitioner also argues that Illinois's independent review law conflicts with ERISA's fiduciary requirements. Br. for Pet'r at 22 n.5. This argument is illogical. Independent review no more conflicts with ERISA's fiduciary requirements than does arbitration. A benefit determination can be subject to a "full and fair review by an appropriate named fiduciary" as well as be subject to independent review. The one does not preclude the other. *See John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 98 (1993). ("ERISA leaves room for complementary or dual federal and state regulation. . . . ")

Clair Adams, 121 S. Ct. 1302, 1307 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). This Court, in *Pilot Life*, mentions that ERISA § 502 "was modeled on the exclusive remedy provided by § 301 of the Labor Management Relations Act (LMRA), 61 Stat. 156, 29 U.S.C. § 185," 481 U.S. 41, 52.[19] This Court has never considered arbitration clauses to conflict with the exclusive remedies in LMRA § 301. *See United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960). Additionally, this Court held that a provision for exclusive federal jurisdiction in another federal statute did not prohibit arbitration. *See Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 227-229 (1987) (exclusive federal jurisdiction provision in Securities Exchange Act of 1934 does not prohibit arbitration). Consistent with these holdings, ERISA benefit claims have been held to be arbitrable, *see Graphic Communications Union, District Council No. 2 AFL-CIO v. GCIU-Employer Retirement Benefit Plan*, 917 F.2d 1184 (9th Cir. 1990), and most circuits that have considered it have held that even statutory claims under ERISA are arbitrable. *See Williams v. Imhoff*, 203 F.3d 758 (10th Cir. 2000); *Bird v. Shearson Lehman/American Express, Inc.*, 926 F.2d 116 (2d

[19] There are notable differences between the Labor Management Relations Act (LMRA) § 301, 29 U.S.C. § 185 (2001), and the Employee Retirement Income Security Act (ERISA) § 502, 29 U.S.C. § 1132 (2001). These differences, however, go to show that because of ERISA's saving clause, § 502 was never intended to limit remedies to the same extent as § 301. *See* discussion *infra* at 25-26.

Cir. 1991); *Pritzker, et al. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 7 F.3d 1110 (3rd Cir. 1993); *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988); *but see Amaro v. Bernard*, 618 F.2d 559 (9th Cir. 1980).

The fact that Illinois's independent review is imposed by state law rather than voluntarily undertaken by an insurer does not alter the conclusion that arbitration does not conflict with ERISA § 502. The Federal Arbitration Act (FAA), 9 U.S.C.S. § 1, *et seq.* (2001) itself makes enforceable agreements to arbitrate, and the Illinois law does nothing more than impose a requirement on insurers that they agree with their insureds to engage in a particular kind of state sanctioned arbitration. The insurer's agreement with the insureds is not any less an enforceable agreement because the state dictates its terms; state insurance regulations saved from preemption by ERISA always alter or control the terms of the agreement between an insurer and its insureds. *See Metropolitan Life*, 471 U.S. at 741; *Ward*, 526 U.S. at 375-376. According to ERISA's saving clause, states are free to impose requirements directly on insurers, and consequently, indirectly on plans. *See FMC Corp.*, 498 U.S. at 64. Illinois's independent review law is a law that regulates insurance within the meaning of ERISA's saving clause. Because arbitration does not conflict with the remedial scheme of either the LMRA or ERISA, a state law like Illinois's independent review law, which imposes an arbitration-like procedure, should also not be preempted.

Even if state insurance laws requiring "involuntary" independent review are viewed as outside the specific protection of the FAA, but "merely" within the ambit of the insurance saving clause, the analogy to arbitration

clauses still demonstrates the absence of any conflict with ERISA. State regulation of insurance is as much a favored federal policy under the McCarran-Ferguson Act as is arbitration under the FAA. *See Smith v. Pacificare Behavioral Health of California, Inc.*, 2001 Cal. App. LEXIS 842 at *23-*28 (October 25, 2001) (citing *SEC v. National Securities, Inc.*, 393 U.S. 453, 458-459 (1969)). Furthermore, arbitration under the FAA is saved from preemption under ERISA § 514(d), 29 U.C.S. § 1144(d), which is similar in structure to the saving clause under ERISA § 514(b)(2)(A). ERISA § 514(d) states that "[n]othing in this title shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States . . . " and similarly, § 514(b)(2)(A) states that " . . . nothing in this title shall be construed to exempt or relieve any person from any law of any state which regulates insurance. . . . " The arbitration cases cited above demonstrate that a dispute resolution mechanism saved from preemption by the federal law saving clause, which perfectly parallels the insurance saving clause, can be harmonized with ERISA's assertedly exclusive remedial provisions. If the enforcement of arbitration agreements does not conflict with ERISA, then neither does the enforcement of state mandated independent review.

2. Even if Illinois's independent review law is a remedy, it is saved from preemption.

This Court should reaffirm the intended role of the "saving clause" in ERISA by clarifying the relationship between the civil remedies provided in ERISA § 502 and

the "saving clause" in ERISA § 514(b)(2)(A), which prohibits any construction of title I of ERISA which would "relieve any person from any law of any State which regulates insurance. . . . " 29 U.S.C. § 1144(b)(2)(A) (2001). Petitioner argues that Illinois's independent review law, because it adds to ERISA's "exclusive remedies" under § 502, undermines the statutory purpose of federal uniformity in the administration of ERISA plans. Br. for Pet'r at 19. This argument fails with respect to state laws that regulate insurance. This Court acknowledged in *Metropolitan Life*, that "disuniformities are the inevitable result of the congressional decision to 'save' local insurance regulation." 471 U.S. at 747.

a. *Pilot Life* did not take into account the presumption against preemption, which has informed this Court's recent preemption opinions.

This Court's observation in *Pilot Life* that laws regulating insurance cannot supplement the remedies provided by § 502 of ERISA was dicta. *See* 481 U.S. at 54. *Pilot Life* did not involve a law that regulated insurance within the meaning of ERISA's saving clause. *Id.* at 51. Thus, it was not necessary for this Court in *Pilot Life* to say that Congress intended that all remedies that relate to ERISA plans, regardless of whether or not they regulate insurance, are to be the exclusive vehicle for beneficiary recovery. *Id.* at 52.[20]

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[20] This Court in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987), also discussed the exclusive nature of ERISA's remedies under § 502(a)(1)(B). *Taylor*, like *Pilot Life*, did not involve a state law that regulates insurance. *Id.* at 62. Consequently, this Court in *Taylor* had no occasion to consider whether the otherwise exclusive nature of ERISA § 502 is limited by ERISA's saving clause, § 514(b)(2)(A).

Furthermore, *Pilot Life* did not take into account the presumption against preemption, which has informed this Court's recent preemption opinions. In light of the post-*Pilot Life* recognition of the importance of preserving state law, the intended role of ERISA's saving clause should be clarified so that state laws that regulate insurance are not preempted merely because they provide a remedy. This Court's recent ERISA preemption cases emphasize Congress's intent to reserve to the states those laws that are part of their historic police powers.

This Court has recognized that insurance is one of the areas that is part of the historic police powers of the states. *See New York State Conference of Blue Cross Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1985). The United States observed, in its Brief as Amicus Curiae in *Ward*, that this Court's recent recognition of this presumption against preemption reinforces the force of the plain meaning of ERISA's saving clause.[21] In light of the

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[21] "[The] force of the savings provision's express term is reinforced by the Court's frequent recognition – particularly in recent cases – that ERISA's preemption provisions must be read against the background of the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " Br. for U.S. as Amicus Curiae at 30-31, *Ward*, 526 U.S. 358 (No. 97-1868), (citing *New York Conference of Blue Cross Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)); *see also De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S.

presumption against preemption, this Court should clarify that ERISA § 514(b)(2)(A), ERISA's saving clause, saves state laws that regulate insurance, even if they are alternative remedies to ERISA § 502.[22] Accordingly, the language in *Pilot Life* regarding Congress's intent for ERISA's remedies to be exclusive should be limited to state laws that relate to an ERISA plan, but are outside the scope of the saving clause. *See* Br. for U.S. as Amicus Curiae at 28, *Ward* (No. 97-1868); *see also Franklin H. Williams Ins. Trust v. Travelers Ins. Co.*, 50 F.3d 144 (2d Cir. 1995); *but see Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1988); *In re Life Ins. Co. of N. Am.*, 857 F.2d 1190, 1194-1195 (8th Cir. 1988).

b. Under the plain language of ERISA, the saving clause, § 514(b)(2)(A), limits the preemptive effect of § 502.

ERISA's express preemption provision, § 514, explains the relationship between ERISA and other laws. Section 514(a) states that, "[e]xcept as provided in subsection (b) of this section, the provisions of this title [title I] and title IV shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan. . . . " 29 U.S.C. § 1144(a) (2001). This Court

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806, 813 n.8 (1997), *California Div. of Labor Standards Enforcement v. Dillingham Const. N.A.*, 519 U.S. 316, 325 (1997).

[22] *See Franklin H. Williams Ins. Trust v. Travelers Ins. Co.*, 50 F.3d 144, 151 (2d Cir. 1995) (the Second Circuit explained that "[i]t would be quixotic to rule that a claim under a state statute that is saved from ERISA preemption . . . may nonetheless be enforced only via ERISA provisions and remedies.")

has often described the "expansive sweep" of this provision. *See Pilot Life*, 481 U.S. at 47 (citations omitted).

Congress, however, "substantially qualified" the otherwise sweeping federal preemption of ERISA § 514(a) by including the saving clause, ERISA § 514(b)(2)(A). *See Metropolitan Life*, 471 U.S. at 724. ERISA's saving clause states that "[e]xcept as provided in subparagraph (B),[23] *nothing in this title* shall be construed to exempt or relieve any person from any law of any State which regulates insurance . . . " 29 U.S.C. § 1144(b)(2)(A) (2001) (footnote added, emphasis added).[24] On its face, ERISA preempts state laws that relate to ERISA plans, *unless* they regulate insurance. This Court supported this interpretation in *Metropolitan Life* and in *Pilot Life* before the issue of § 502 is discussed. *See* 471 U.S. at 733, 735; 481 U.S. at 47.

By the plain language of the statute, ERISA § 502 is subject to the saving clause. The saving clause provides that nothing in title I, which includes § 502, shall be construed to exempt or relieve any person from *any law* of any state which regulates insurance. Section 514 is the only place in ERISA that contains preemption language. Clearly, if Congress intended to save all laws that regulate insurance from preemption, except those that provide remedies, it would have said so in § 514. Section 514(b)(2)(A) already includes one exception, subsection

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[23] Referencing ERISA's deemer clause, § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B), which provides that a state cannot deem an ERISA plan an insurer for the purpose of regulating it. The deemer clause is not at issue in this case.

[24] Laws that regulate banking and securities are also exempted from the preemptive scope of § 514(b)(2)(A).

(B), for laws that deem ERISA plans to be insurers. Surely, Congress would have included another exception, if it meant to provide one.

This Court in *Pilot Life* stated that the comprehensive nature of the language and structure of § 502 "provide[s] strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." 481 U.S. at 54 (citing *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985)). To apply this statement to all state laws, including those that regulate insurance within the meaning of § 514(b)(2)(A), unjustifiably discounts the language and structure of the entire ERISA statute, and the saving clause in particular. This Court should reaffirm the plain language of ERISA and clarify that § 502 provides the exclusive remedy only where a state law that relates to an ERISA plan is not within § 514's saving clause. *See Ward*, 526 U.S. at 376 n.7 (acknowledging without deciding Government's argument to same effect). This Court should not resort to legislative history where the words of the statute are plain. *See Harris Trust & Saving Bank v. Salomon Smith Barney Inc.*, 120 S. Ct. 2180, 2190 (2000) (citations omitted). As explained below, the legislative history of § 502 is an unreliable guide to the proper interpretation of the saving clause.

c. The legislative history of ERISA is misleading because the analogy to § 301 of LMRA is flawed.

In *Pilot Life*, this Court reasoned that, based on the legislative history of ERISA, Congress intended to federalize ERISA remedies under § 502 the same way that § 301 of LMRA had federalized remedies for violation of collective bargaining agreements. 481 U.S. at 55. This Court therefore concluded that the federal remedies available under § 502 displace state causes of action. *Id.* at 56. The obvious and fundamental differences between LMRA and ERISA warrant reconsideration of this conclusion. The LMRA governs the relationship between labor unions and employers, which is a wholly federal body of law. ERISA, with the inclusion of the "saving clause," clearly contemplates that both state and federal laws apply to insured ERISA plans. *See Metropolitan Life*, 471 U.S. at 727-747.

The United States' position with respect to the role of § 502 has changed since *Pilot Life*. *See*, Br. for U.S. as Amicus Curiae at 25-32, *Ward* (No. 97-1868). The United States' amicus brief in *Ward* pointed out that LMRA does not contain a provision comparable to the "saving clause" in ERISA. *Id.* at 31. Therefore, "Congress' intent to pattern suits under Section 502 on suits under Section 301 of the LMRA . . . does not bear directly on the preemption of a state law cause of action or remedy that 'regulates insurance.' " *Id.* The Secretary of the Department of Labor acknowledged in its amicus brief in *Moran*, that the "analogy of the LMRA to ERISA [in *Pilot Life*] was not completely well-founded." Br. for the Secretary of Labor as

Amicus Curiae at 19-20, *Moran* (No. 99-2574). The Secretary pointed out that the LMRA has been "broadly interpreted to occupy the whole field of contractual relations between employers and labor organization, whereas § 514(b)(2)(A) . . . makes clear that Congress did not intend to preempt entirely every state cause of action relating to such plans." *Id.* (citing *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 25 (1983)).

This Court should not read ERISA's legislative history as limiting the saving clause, recognizing that the rationale in the second half of *Pilot Life* was based, in part, on legislative history that supported an incomplete comparison between ERISA and LMRA.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Seventh Circuit and hold that the Illinois independent review law is not preempted by

ERISA because it is a law that regulates insurance within the meaning of the saving clause, whether or not it is a remedy.

Respectfully submitted,

JENNIFER R. COOK
Counsel of Record
MARY ELIZABETH SENKEWICZ
NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS
444 North Capitol Street, Suite 701
Washington, D.C. 20001
(202) 624-7790

MARC I. MACHIZ
COHEN, MILSTEIN, HAUSFELD & TOLL, P.L.L.C.
1100 New York Ave., N.W.
West Tower, Suite 500
Washington, D.C. 20005
(202) 408-3757